

The JS 44 civil cover sheet and the information contained therein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS CAPITAL ONE BANK (USA) N.A. (b) County of Residence of First Listed Plaintiff: City of Richmond, Virginia (EXCEPT IN U.S. PLAINTIFF CASES) (c) Attorney's (Firm Name, Address, and Telephone Number) James F. McCabe MORRISON & FOERSTER LLP James R. McGuire 425 Market Street Rita F. Lin San Francisco, CA 94105-2482 Sarah E. Griswold (415) 268-7000	DEFENDANTS EDMUND G. BROWN, JR., in his capacity as Attorney General of the State of California County of Residence of First Listed Defendant San Francisco County (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known)
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only) <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only) <table style="width: 100%;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State.</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State.	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)										
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Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input checked="" type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	TORTS <table style="width: 100%;"> <tr> <th style="text-align: left;">PERSONAL INJURY</th> <th style="text-align: left;">PERSONAL INJURY</th> </tr> <tr> <td> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury </td> <td> <input type="checkbox"/> 362 Personal Injury — Med. 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Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA(1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input checked="" type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
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V. ORIGIN (Place an "X" in One Box Only) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from another district (specify) <input type="checkbox"/> 6 Multidistrict Litigation <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION	Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 12 U.S.C. § 484; 42 U.S.C. § 1983 Brief description of cause: Plaintiff seeks declaratory and injunctive relief from Defendant's unlawful attempts to exercise visitatorial powers.
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VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY	PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE". Not applicable.
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IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY) <input checked="" type="checkbox"/> SAN FRANCISCO/OAKLAND <input type="checkbox"/> SAN JOSE

DATE May 2, 2008	SIGNATURE OF ATTORNEY OF RECORD
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 CAPITAL ONE BANK (USA), N.A.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

CAPITAL ONE BANK (USA), N.A.,

Plaintiff,

v.

EDMUND G. BROWN, JR., in his capacity as
 Attorney General of the State of California,

Defendant.

CV 08 No.

2289

**COMPLAINT FOR
 DECLARATORY AND
 INJUNCTIVE RELIEF**
 (12 U.S.C. § 484; 42 U.S.C. § 1983)

Plaintiff Capital One Bank (USA), N.A. ("Plaintiff") alleges as follows:

OVERVIEW OF THE ACTION

1. Plaintiff brings this action to require the Attorney General of the State of California (the "Attorney General") to comply with long-established federal law. The Attorney General seeks to exercise rights of "visitation" over Plaintiff by demanding that Plaintiff respond to information requests directed at whether their credit card marketing, advertising, issuing, servicing, and related banking practices violate California or federal law. Plaintiff is a national bank, and as such is an instrumentality of the federal government, authorized under the National Bank Act (12 U.S.C. §§ 21 *et seq.*) to exercise enumerated and incidental powers related to the business of banking. Plaintiff is subject to the exclusive visitorial power of the Office of the

1 Comptroller of the Currency ("OCC") under the Visitorial Powers Statute, 12 U.S.C. § 484.
2 "Visitorial powers" include the power to examine books and records of a national bank, as well as
3 the power to enforce a national bank's compliance with applicable law in the exercise of its
4 federally authorized banking functions.

5 **PARTIES**

6 2. Plaintiff Capital One Bank (USA), N.A. is a national bank organized under the
7 National Bank Act, as administered by the OCC, and is headquartered in Virginia. Capital One
8 Bank (USA), N.A. is a wholly-owned subsidiary of Capital One Financial Corporation, a publicly
9 traded company. Capital One Bank (USA), N.A. provides traditional banking services to its
10 customers, including receiving deposits, cashing checks, making loans, and extending credit
11 through credit cards. Capital One Bank (USA), N.A. was formerly chartered as Capital One
12 Bank, a Virginia general purpose bank, but on March 1, 2008, converted its charter to that of to a
13 national banking association organized under the National Bank Act. Assets and records
14 formerly owned by Capital One Bank are now owned by Capital One Bank (USA), N.A. To the
15 extent this Complaint refers to Capital One Bank (USA), N.A., that term includes Capital One
16 Bank.

17 3. Defendant Edmund G. Brown, Jr. is the Attorney General of the State of California
18 and is sued herein in his official capacity. He maintains offices at 455 Golden Gate Avenue,
19 Suite 11000, San Francisco, California.

20 **JURISDICTION AND VENUE**

21 4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
22 § 1331, in that it arises under the Constitution and laws of the United States, including the
23 Supremacy Clause of the United States Constitution, U.S. Const. art. VI, the National Bank Act,
24 the regulations duly promulgated thereunder, and 42 U.S.C. § 1983. In addition, jurisdiction is
25 proper under 28 U.S.C. § 1343(a)(3), in order to protect federal rights and immunities that are
26 subject to deprivation under color of state law. This Court is authorized to issue a declaratory
27 judgment pursuant to 28 U.S.C. §§ 2201-02.

1 5. Venue of this action is proper in this district pursuant to 28 U.S.C. § 1391(b)(2)
2 because a substantial part of the events giving rise to these claims occurred in this district.

3 **INTRADISTRICT ASSIGNMENT**

4 6. Pursuant to Civil Local Rule 3-2(c), assignment to the San Francisco Division is
5 proper because a substantial part of the events or omissions which give rise to Capital One Bank
6 (USA), N.A.'s claims occurred in San Francisco County.

7 **FACTUAL ALLEGATIONS**

8 7. On or about November 13, 2006, Defendant made demands upon "Capital One" for
9 production of books and records concerning and interviews with employees knowledgeable about
10 various banking practices of Plaintiff. The Attorney General's demand stated that "the California
11 Attorney General has substantial concerns about the credit card practices of Capital One. We are
12 offering you the opportunity to meet with us before we determine what action, if any, should be
13 taken to address these concerns." The subjects on which interviews and documents were
14 requested included solicitation of credit card account applications mentioning balance transfers,
15 issuance of credit cards on reaffirmation of preexisting debt, account closing practices, and some

16 8. At the time of the Attorney General's demand, the only affiliates of Capital One
17 Financial Corporation that had theretofore offered credit card accounts to U.S. residents were
18 Capital One Bank and Capital One, F.S.B. a federally chartered savings bank. On July 1, 2007,
19 Capital One, F.S.B. merged into Capital One, N.A., a national bank. In that transaction, Capital
20 One, F.S.B.'s credit card receivables relating to "Capital One" credit card accounts and associated
21 records were transferred to Capital One Bank, which has since converted to Capital One Bank
22 (USA), N.A. All credit card accounts established with the "Capital One" mark and their related
23 records – whether opened with Capital One Bank, Capital One, F.S.B. or with Capital One Bank
24 (USA) N.A. – are currently held by Plaintiff.

25 9. On receipt of the information demand, Plaintiff began discussions with the Attorney
26 General's Office in an effort to understand the nature of any specific business practices of
27 concern, to work with the Attorney General's Office to narrow the scope of the requests. Plaintiff
28 provided a number of documents responsive to the Attorney General's demands, as well as a

1 narrative description of certain credit card practices, in December, 2006. The Attorney General
2 made further requests for documents and information regarding Plaintiff's credit card lending in
3 January, 2007. Plaintiff provided further information responsive to the Attorney General's
4 demands in the fall of 2007.

5 10. The OCC acknowledged in its publicly available Weekly Bulletin for the week
6 ended September 8, 2007 that on September 4, 2007 it received from Capital One Bank an
7 application to convert its charter to that of a national bank. The OCC acknowledged in its
8 publicly available Weekly Bulletin for the week ended October 20, 2007 that it approved that
9 application on October 19, 2007.

10 11. As of March 1, 2008, Capital One Bank, a Virginia state-chartered bank, converted
11 its charter to that of a national banking association organized under the National Bank Act, as
12 administered by the OCC, and known as Capital One Bank (USA), N.A. Capital One Bank's
13 assets are now owned by Capital One Bank (USA), N.A.

14 12. On March 18, 2008, Plaintiff advised the Attorney General of its charter conversion,
15 and explained that the OCC now exercises complete and exclusive visitorial powers over
16 Plaintiff, which include the ability to inspect Plaintiff's books and records and to enforce
17 Plaintiff's compliance with applicable federal and state laws concerning its banking practices.

18 13. On April 8, 2008, the Attorney General responded by letter, making demands for
19 inspection of Plaintiff's books and records regarding its exercise of its banking powers. The
20 Attorney General also asked that "Capital One" enter into a form of tolling agreement that
21 recited:

22 The California Attorney General is conducting an inquiry into
23 [COMPANY NAME]'s practices and the Attorney General and
24 [COMPANY NAME] have begun discussions with respect to the Attorney
25 General's concerns regarding what it views as [COMPANY NAME]'s
26 possible violations of Business and Professions Code sections 17200 and
27 17500 and other possible violations of statutory and common law. The
28 Attorney General has refrained from filing any action in connection with
those concerns during the discussion.

1 The form provided for a waiver of all of “Capital One’s” defenses based on delay or passage of
 2 time that might be applicable with respect to “any action brought by the People based on causes
 3 of action that exist on” a date to be entered into the Attorney General’s form tolling agreement.

4 14. On May 2, 2008, counsel for the Plaintiff, in a telephone conference with Deputy
 5 Attorney General Kathrin Sears, asked that the Attorney General withdraw both his request for
 6 inspection of books and records relating to the banking business of Plaintiff and his request for a
 7 tolling agreement with respect to claims against “Capital One.” DAG Sears declined to withdraw
 8 the Attorney General’s requests.

9 **FIRST CAUSE OF ACTION**
 10 **(For Injunctive Relief Based Upon**
 11 **the Visitorial Powers Statute and the National Bank Act)**

12 15. Plaintiff realleges and fully incorporate by reference each of the preceding
 13 paragraphs as if fully set forth herein.

14 16. The pertinent provisions of the Visitorial Powers Statute, which is part of the
 15 National Bank Act, are codified at 12 U.S.C. § 484(a) and provide as follows:

16 No national bank shall be subject to any visitorial powers except as
 17 authorized by Federal law, vested in the courts of justice or such as
 18 shall be, or have been exercised or directed by Congress or by
 19 either House thereof or by any committee of Congress or of either
 20 House duly authorized.

21 17. The Comptroller of the Currency, the officer authorized by Congress to charter
 22 national banks and to regulate them, is authorized by 12 U.S.C. § 93a to issue regulations with
 23 respect to the National Bank Act.

24 18. The Comptroller of the Currency has issued, as part of Title 12, Chapter I, Part 7 of
 25 the Code of Federal Regulations, certain regulations at section 7.4000 thereof, entitled “Visitorial
 26 Powers” (the “Visitorial Powers Regulations”).

27 19. In 12 C.F.R. section 7.4000(a)(1), the Visitorial Powers Regulations provide:

28 Only the OCC or an authorized representative of the OCC may
 exercise visitorial powers with respect to national banks State
 officials may not exercise visitorial powers with respect to national
 banks, such as conducting examinations, inspecting or requiring the
 production of books or records of national banks, or prosecuting
 enforcement actions, except in limited circumstances authorized by
 federal law.

1 20. The Visitorial Powers Regulations have the force of federal law.

2 21. Through his issuance of multiple letters requesting production of banking records
3 and his request for a tolling agreement to extend the time in which he might sue the Plaintiff, the
4 Attorney General impermissibly and unlawfully attempts to exercise visitorial powers that state
5 officials are prohibited from exercising by federal law.

6 22. Through the requests for production of banking records, and the request for a tolling
7 agreement, the Attorney General seeks to investigate and bring suit with respect to Plaintiff's
8 credit card activities. By attempting to enforce such laws against what is now a national bank, the
9 Attorney General impermissibly and unlawfully attempts to exercise visitorial powers that state
10 officials are prohibited from exercising by federal law.

11 23. Unless enjoined by order of this Court, the Attorney General threatens to investigate
12 and to sue Plaintiff for possible violations of federal or state law, in violation of the United States
13 Constitution (Supremacy Clause), the Visitorial Powers Statute, the Visitorial Powers
14 Regulations, and the National Bank Act by exercising visitorial powers over a national bank and
15 obstructing and conditioning its exercise of incidental and enumerated powers under the National
16 Bank Act and its implementing regulations.

17 24. Such violation of federal law by the Attorney General will inflict irreparable harm
18 on Plaintiff and will violate its legal rights under federal law.

19 25. Plaintiff has no adequate remedy at law.

20 26. Accordingly, Plaintiff prays that the Court, preliminarily and permanently, issue an
21 injunction requiring the Attorney General and his agents to cease and desist from all attempts to
22 investigate or bring suit against Plaintiff regarding banking activities.

23 **SECOND CAUSE OF ACTION**
24 **(For Declaratory Relief Based Upon**
 the Visitorial Powers Statute and the National Bank Act)

25 27. Plaintiff realleges and fully incorporate by reference each of the preceding
26 paragraphs as if fully set forth herein.

27 28. A real and justiciable controversy exists between the Attorney General, on the one
28 hand, and the Plaintiffs, on the other. Plaintiff contends that the Attorney General may not,

1 consistent with the United States Constitution, the Visitorial Powers Statute, the Visitorial Powers
2 Regulations, and the National Bank Act, investigate or sue Plaintiff regarding banking activities.
3 The Attorney General contends otherwise.

4 29. Accordingly, Plaintiff prays that the Court issue a declaratory judgment that the
5 Attorney General and his agents may not, consistent with the United States Constitution, the
6 Visitorial Powers Statute, the Visitorial Powers Regulations, and the National Bank Act,
7 investigate or sue Plaintiff regarding banking activities.

8 **THIRD CAUSE OF ACTION**
9 **(For Injunctive Relief Based Upon 42 U.S.C. § 1983)**

10 30. Plaintiff realleges and fully incorporate by reference each of the preceding
11 paragraphs as if fully set forth herein.

12 31. Under federal law, including the United States Constitution (Supremacy Clause),
13 the Visitorial Powers Statute, the Visitorial Powers Regulations, the National Bank Act, and the
14 regulations duly promulgated thereunder, a national bank has the right to be free from unlawful
15 attempts to exercise visitorial powers over it and the right to be free from unlawful attempts to
16 obstruct or condition its exercise of its incidental and enumerated banking powers.

17 32. The Attorney General seeks and threatens to deprive Plaintiff of its rights to be free
18 from unlawful exercises of visitorial powers and unlawful attempts to obstruct and condition the
19 exercise of its incidental and enumerated banking powers.

20 33. The Attorney General has purported to act under color of state law.

21 34. Unless enjoined by order of this Court, the Attorney General threatens to investigate
22 or sue the Plaintiff regarding banking activities, in violation of 42 U.S.C. § 1983, under color of
23 state law, by exercising visitorial powers over Plaintiff and obstructing and conditioning its
24 exercise of incidental and enumerated powers under the National Bank Act.

25 35. Such violation of federal law by the Attorney General will inflict irreparable harm
26 on Plaintiff and will violate its legal rights under federal law.

27 36. Plaintiff has no adequate remedy at law.
28

1 37. Accordingly, Plaintiff prays that the Court, preliminarily and permanently, issue an
2 injunction requiring the Attorney General and his agents to cease and desist from all attempts to
3 investigate or bring suit against Plaintiff regarding banking activities.

4 **FOURTH CAUSE OF ACTION**
5 **(For Declaratory Relief Based Upon 42 U.S.C. § 1983)**

6 38. Plaintiff realleges and fully incorporate by reference each of the preceding
7 paragraphs as if fully set forth herein.

8 39. A real and justiciable controversy exists between the Attorney General, on the one
9 hand, and Plaintiff, on the other. Plaintiff contends that the Attorney General may not, consistent
10 with 42 U.S.C. § 1983, investigate or sue Plaintiff regarding banking activities. The Attorney
11 General contends otherwise.

12 40. Accordingly, Plaintiff prays that the Court issue a declaratory judgment that the
13 Attorney General and his agents may not, consistent with 42 U.S.C. § 1983, investigate or sue
14 Plaintiff regarding banking activities.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff prays for relief as follows:

17 A. Entry of a declaratory judgment that the Attorney General and his agents may not,
18 consistent with the United States Constitution, the Visitorial Powers Statute, the Visitorial
19 Powers Regulations, the National Bank Act, and 42 U.S.C. § 1983, investigate or sue
20 Plaintiff regarding banking activities;

21 B. Since Plaintiff has no adequate remedy at law and is threatened with irreparable
22 injury, issuance of temporary, preliminary, and permanent injunctions, requiring the Attorney
23 General and his agents to cease and desist from all attempts to investigate or bring suit
24 against Plaintiff regarding banking activities;

25 C. Costs incurred in maintaining this suit;

26 D. Reasonable attorneys' fees and other expenses incurred in maintaining this suit;
27 and
28

1 E. Such other and further relief as the Court may deem just and proper.

2 Dated: May 2, 2008

JAMES F. MCCABE
JAMES R. MCGUIRE
RITA F. LIN
SARAH E. GRISWOLD
MORRISON & FOERSTER LLP

6 By:


James F. McCabe

Attorneys for Plaintiff
CAPITAL ONE BANK (USA), N.A.